No. 86-628

(1)

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1986

IN THE MATTER OF KATHY G.J. (ANONYMOUS),

Petitioner,

vs.

ARNOLD D. (ANONYMOUS),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

IRA RICHARD BENNETT
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 267-1918

INGRID GHERMAN
Of Counsel

4498
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QUESTIONS PRESENTED

1. Was the subject non-marital child denied due process under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

2. Are the New York state statutes, namely, Sections 413, 513, and 545 of the Family Court Act, constitutional; is there a permissible distinction between the manner in which support is to be fixed for a marital and non-marital child?

3. Should the proceeding be remanded to the state courts so as to permit and allow full and complete financial discovery of the respondent-father as to his current financial status so as to determine a proper quantum of support for the non-marital child, consistent with the father's extensive financial abilities?

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No.

In The

Supreme Court of the United States

October Term, 1986

IN THE MATTER OF KATHY G.J. (ANONYMOUS),

Petitioner,

vs.

ARNOLD D. (ANONYMOUS),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

OPINIONS BELOW

The Order of the New York State Court of Appeals dated July 3, 1986 appears in Appendix A; no decision was rendered by the Court of Appeals; the Order of the Supreme Court of the State of New York, Appellate Division: Second Judicial Department dated April 7, 1986, appears in Appendix B; the Decision of the Supreme Court of the State of New York, Appellate Division: Second Judicial Department, dated April 7,

1986, appears in Appendix C; the Order of Permanent Support, dated June 25, 1984, of the Family Court of the State of New York: County of Queens (J. Kaplan) appears in Appendix D; excerpts of the Decision of J. Kaplan, of the Family Court of the State of New York: County of Queens, dated June 7, 1984, appears in Appendix E.

JURISDICTION

The order to be reviewed was dated and entered July 3, 1986. The statutory provision believed to concur jurisdiction to review the order in question by writ of certiorari is 28 U.S.C. Section 2103.

CONSTITUTIONAL PROVISION INVOLVED

The provision of the United States Constitution involved is Section 1 of Article XIV, which provides in relevant part that:

> "No State shall . . .; nor shall any State deprive any person of life, liberty or property, without due process of law . . .".

STATEMENT OF THE CASE

On October 23, 1976, the petitioner did give birth to an out-of-wedlock child; a petition seeking an order of filiation and child support was commenced on October 8, 1977 in the Family Court of the State of New York: County of Queens. The trial as to the issue of paternity was commenced during the latter portion of 1978 and did conclude on March 1, 1979. On May 21, 1980, the Family Court: Queens County (J. Kaplan) did grant an order formally adjudicating the respondent herein as the father of petitioner's child. The father of the child is a famous, internationally known singer, who is married and has four children of his marriage.

The Appellate Division of the Supreme Court of the State of New York: Second Judicial Department, did unanimously affirm the determination of paternity as to the respondent (80 A.D. 2d 896, 437 N.Y.S. 2d 118). Pending the appeal of the respondent herein to the Appellate Division of the Supreme Court of the State of New York: Second Judicial Department, from the order of filiation, which adjudged the respondent to be the father of petitioner's child, the petitioner did move the Family Court of the State of New York: County of Queens, on October 24, 1980, for financial disclosure from the respondent as to his income, assets and finances, the respondent did move for a protective order, although no formal determination was rendered by the Family Court, respective counsel did enter into an agreement, without conceding any limitation of his/her rights that the respondent would furnish copies of his 1978, 1979 and 1980 U.S. Income Tax Returns, as well as statements of financial condition of the respondent as of December 31, 1980 and June 30, 1981; said agreement was made by Order of the Family Court of the State of New York: County of Queens (J. Kaplan) dated August 25, 1981. By notice of motion dated November 23, 1981, the petitioner did renew her application for detailed financial disclosure from the respondent, said application came on to be heard before the trial court during the mid-portion of December, 1981, a decision/order, as granted by Judge Kaplan (Family Court: Queens County), dated November 23, 1982; the Family Court did deny further financial disclosure. Respondent's tax returns indicated gross annual receipts for the years 1978, 1979 and 1980 of between 4.3 million dollars and 5 million dollars each year, and further indicated that the respondent had a net worth in excess of eight million dollars as of June 30, 1981.

The trial, to determine the quantum of permanent child support was commenced in June of 1983 and concluded in July of 1983. A decision/order dated June 7, 1984 was rendered by J. Kaplan of the Family Court of the State of New York: County

of Queens; a formal dispositional order of permanent support was granted by Judge Kaplan on June 25, 1984.

The petitioner did serve a notice of appeal upon respondent, and a notice of appeal and notice pursuant to N.Y. State Executive Law Section 71 upon the Attorney General of the State of New York, since the constitutionality of various provisions of the Family Court Act of the State of New York was raised.

On April 7, 1986, the Appellate Division of the Supreme Court: Second Judicial Department did render its written decision and order affirming the dispositional order of the Family Court, and modifying same in part (____ A.D. 2d ____; 501 N.Y.S. 2d 58). The court did eliminate the 95% - 5% allocation of support and did direct the respondent to pay only $257 per week for child support, and a maximum of $12,000 per year for private schooling, in "light of the respondent's high income."

Both the petitioner and respondent did move, in the New York State Court of Appeals, for leave to appeal from the order of the Appellate Division of the Supreme Court of the State of New York: Second Judicial Department; respondent did further move for a stay; by order of the New York State Court of Appeals dated July 3, 1986, both the petitioner's motion and respondent's motion were each dismissed upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the constitution.

REASONS FOR GRANTING THE WRIT

The instant case brings up for review the right of a child born "out-of-wedlock" (non-marital child) to be supported according to the father's financial ability.

Although the State of New York has enacted statutes

providing for the support of both "in-wedlock" and "out-of-wedlock" children, it is the contention of the petitioner herein that the standards set forth in said statutes deny her child's right to equal protection, in that her child is being denied a proper quantum of support as would be accorded to the respondent's "marital children," under the applicable statutes.

Indeed, the label "*filius nullius*" (no one's child) aptly described the historical legal treatment of the illegitimate child [Fritz, "*Judging the Status of the Illegitimate Child in Various Western Legal Systems*," 23 Loy. L. Rev. 1 (1977)].

Changing mores of society have addressed the nomenclature of children born out-of-wedlock; originally, such children were identified as "bastards"; these children were then identified as "illegitimate children"; at the present time, these children are now being identified as being born "out-of-wedlock" and/or "non-marital children."

The present statute in the State of New York pertaining to support of out-of-wedlock children is: Section 545 of the Family Court Act of the State of New York, as added by Chapter 68 of the Laws of 1981, and Section 513 of the F.C.A. of the State of New York.

Accordingly, appropriate emphasis must be upon the welfare of the *child*.

The primary purpose of establishing paternity is to insure that adequate provision will be made for the child's needs, in accordance with the means of the parents.

In *Pamela P. v. Frank S.*, 59 N.Y. 2d 1, 462 N.Y.S. 2d 819, 449 N.E. 2d 713, the New York State Court of Appeals did, in 1983, state:

> "Thus, in determining the parents' obligations to support their child, the statute mandates consideration of two factors— the needs of the child for support and education and the financial ability of the parents to contribute to that support."

Section 413 of the Family Court Act of the State of New York provides for the criteria to be utilized for determination of child support for a marital child; Sections 513 and 545 of the Family Court Act of the State of New York provide for the support of non-marital children.

In *E.M. v. G.S.*, 122 Misc. 2d 177, 470 N.Y.S. 2d 77 (1983), Judge Turret of the Family Court of the State of New York: New York County, did review the recent amendments to Sections 413 and 545 of the Family Court Act, and did state:

> "That 'equal protection' requires consideration of the same factors for support of out-of-wedlock children where relevant, regardless that Section 545 F.C.A. was not amended accordingly."

As stated by Professor Krause in an article entitled: "*Legitimate and Illegitimate Offspring of Levy v. Louisiana— First Decisions on Equal Protection and Paternity*," 36 University of Chicago Law Review 338 (1969), at page 353 thereof, states

> " . . . no persuasive reason appears for not providing the illegitimate child a right of support that is equal to the right of support of the legitimate child of divorced parents who, today, constitute a large sub-class of legitimate children in a factual setting that readily compares with that of the illegitimate child."

In *Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872, 35 L. Ed. 2d 56 (1973), this Court stated that:

> "a State may not invidiously discriminate against legitimate children by denying them substantial benefits accorded children generally."

This Court held in *Gomez, supra*, that:

> "once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."

In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972), this Court stated that:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth

> where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise." 406 U.S. at 175-176, 31 L. Ed. 2d 768, 92 S. Ct. 1400 (footnotes omitted).

It is respectfully submitted that the New York statutes presently to be scrutinized by this Court similarly "invidiously discriminate against illegitimate children by denying them substantial benefits accorded marital children generally."

In *Pickett v. Brown*, 462 U.S. 1, 103 S. Ct. 2199, 76 L. Ed. 2d 372 (1983), this Court did, after review of the constitutional validity of statutory classifications based on illegitimacy, express its "special concern for discrimination against illegitimate children." (462 U.S. at page 7.)

The Court, in *Pickett v. Brown, supra*, did state, at 462 U.S. 8:

> "*In view of the history of treating illegitimate children less favorably than legitimate ones, we have subjected statutory classifications based on illegitimacy to a heightened level of scrutiny.* Although we have held that classifications based on illegitimacy are not 'suspect,' or subject to 'our most exacting scrutiny,' *Trimble v. Gordon, supra*, at 767, 52 L. Ed. 2d 31, 97 S. Ct. 1459, 4 Ohio Ops. 3d 296; *Matthews v. Lucas*, 427 U.S. at 506, 49 L. Ed. 2d 651, 96 S. Ct. 2755, the scrutiny applied to them 'is not a toothless one . . . .' *Id.*, at 510, 49 L. Ed. 2d 651, 96 S. Ct. 2755. In *United States v. Clark, supra*, we stated that 'a classification based on illegitimacy is unconstitutional unless it bears "an evident and substantial relation to the particular . . . interests

> [the] statute is designed to serve." ' 445 U.S. at 27, 63 L. Ed. 2d 171, 100 S. Ct. 895. See also, *Lalli v. Lalli, supra*, at 265, 58 L. Ed. 2d 503, 99 S. Ct. 518 (plurality opinion) ('classifications based on illegitimacy . . . are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests'). We applied a similar standard of review to a classification based on illegitimany last Term in *Mills v. Hableutzel*, 456 U.S. 91, 71 L. Ed. 2d 770, 102 S. Ct. 1549 (1982). We stated that restrictions on support suits by illegitimate children 'will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.' *Id.*, at 99, 71 L. Ed. 2d 770, 102 S. Ct. 1549."

In *Pickett v. Brown, supra,* this Court did determine that the two year statute of limitations in the State of Tennessee:

> ". . . restricts the right of certain illegitimate children to paternal support in a way that *the identical right* of legitimate children is not restricted. In this respect, some illegitimate children in Tennessee are treated differently from and less favorably than legitimate children." 462 U.S. 1, p. 12 (emphasis supplied).

The petition at bar, although a paternity proceeding, does not involve a statute of limitations issue.

It does, however, involve the rights of an illegitimate child to equal protection under the laws.

In *Pickett v. Brown, supra*, this Court did carefully select

the use of the term "identical" in a comparison of the rights of "legitimate" and "illegitimate" children.

The State of New York has, both in the Family Court Act and in the Domestic Relations Law, recognized a legimitate state interest in the responsibility of parents to provide support for their natural unemancipated children—be they legitimate or illegitimate.

Yet, in recognizing these needs, the New York State Legislature utilized different words and standards in the operative statutes relating to marital and non-marital offpsring.

What legitimate state interest is there in having two *different* child support standards as contained in the New York State Family Court Act (Section 413—marital children support, and Sections 545 and 513—support of non-marital children)? No substantial relationship to any legitimate state interest exists for the distinction as created by the statutes of the State of New York relative thereto.

That two different standards were created and established by the New York State Family Court Act can be seen from examination of excerpts of the decision of Judge Kaplan (Appendix E), wherein Judge Kaplan stated:

> "The Court rejects Petitioner's oft-recurring urgings that there can be no permissible distinction between the manner in which support is fixed for a marital and non-marital child.
>
> While it is possible that Jennifer may not be treated in the same manner as Respondent's marital children, such a belief would be speculative and ineluctable conclusion since the Court foreclosed

> inquiry into the standard of living of Respondent's children.
>
> The thrust of the Supreme Court cases dealing with equal protection of non-marital children is addressed to areas of general rights and entitlements.
>
> It is unwarranted to utilize those holdings in support of the premises that non-marital children are entitled to child support in the same dollar amount as marital children in the absence of identical statutory criteria.
>
> Petitioner's assertion in this regard constitutes a denigration of marriage, an institution occupying a place in the forefront of our most honored social tradition.
>
> It would do violence to the recently articulated will of the Legislature to treat non-marital children in exactly the same way as marital children as it would to permit non-married persons, without formal contract, to obtain equitable distribution."

These holdings and findings were affirmed by the New York State Supreme Court, Appellate Division: Second Department [Appendix B, ____ A.D. 2d ____, 501 N.Y.S. 2d 58 (1986)].

Respondent's child does not seek equitable distribution for her father, but merely to be treated as *his child*.

Is the interest of the State of New York furthered by this differentiation in standards of support, once paternity has heen established?

Can it be said that the interest of the State of New York, in furthering the institution of marriage and resultant offspring therefrom is a legitimate state interest?

The opinions of the Family Court: Queens County (Appendix E) *and* the New York State Appellate Division: Second Department (Appendix B) appear to be strongly influenced by Judge McLaughlin's decision in *Ellen N. v. Stuart K.*, 88 Misc. 2d 280, 387 N.Y.S. 2d 367 (Family Court, Onondaga County, 1976).

In *Ellen N. v. Stuart K., supra*, Judge McLaughlin specifically refused to be guided by the standards set by this Court in *Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968); and in *Glona v. American Guaranty and Liability Insurance Co.*, 391 U.S. 73, 88 S. Ct. 1515, 20 L. Ed. 2d 441 (1968).

Judge McLaughlin did take note of *Storm v. None*, 57 Misc. 2d 342, 291 N.Y.S. 2d 515 (Family Court, New York County, 1965), wherein Judge Justine Wise Polier did apply Section 413 Family Court Act standards of support to paternity proceedings and did hold that, pursuant to *Levy v. Louisiana, supra*, and *Glona v. American Guaranty and Liability Insurance Co., supra*, a child born out-of-wedlock had the same rights of support as a child born in-wedlock, pursuant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Judge McLaughlin did, in 1976, refuse to accept the holding of *Storm v. None, supra.*

There is a fundamental distinction between the decision in *Ellen N. v. Stuart K., supra*, and the case at bar; the distinction between Sections 413, 513, and 545 of the New York State Family Court Act *cannot be justified* on the basis of the state's concern for maintaining any standard of living.

If the state were concerned with a standard of living it would necessarily have to promote a standard of living *identical to* that which is presently enjoyed by respondent's marital children.

The New York State Appellate Division: Second Judicial Department, in its decision (Appendix B) cited, with approval, *Ellen N. v. Stuart K., supra,* and did adopt the rationale contained therein.

Yet the appellate court took no heed of any of the cases decided by *this Court* subsequent to *Ellen N. v. Stuart K., supra*, which was decided *in 1976.*

Subsequent to 1976, this Court did decide *Trimble v. Gordon*, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977); and *United States v. Clarke*, 445 U.S. 223, 100 S. Ct. 895, 63 L. Ed. 2d 171 (1980); and *Mills v. Hableutzel*, 456 U.S. 91, 102 S. Ct. 1549, 71 L. Ed. 2d 770 (1982); and *Pickett v. Brown, supra* (1983).

Petitioner states herein, as she has since 1980, when the appellate court affirmed the finding of paternity as to the respondent herein (*Matter of Kathy G.J. v. Arnold D.*, 80 A.D. 2d 896, 437 N.Y.S. 2d 118 (1980) that her child is entitled to a standard of support from respondent, with no distinction as between respondent's marital children and petitioner's child, notwithstanding the fact that the subject child herein is a "non-marital child."

In the case at bar this distinction did accrue to the financial disadvantage for the child, and denial of her equal protection rights despite the enormous financial disparity between petitioner and the respondent. Financial inquiry as to the manner and fashion the respondent currently supports his "marital children" was *foreclosed* and denied by the New York State Family Court: Queens County in a previous order.

Do the statutes of the State of New York (F.C.A. Sections 413, 513, and 545) advance permissible state interests by creating different standards for marital and non-marital children?

There is no justification whatsoever for the existence of two differing standards of paternal support, there is *no legitimate state interest being furthered* by the inequality of treatment accorded to children born either in or out of wedlock.

In *Trimble v. Gordon*, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31, this Court did, in 1977, state:

> "The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status." (Page 770)

As Justice Douglas stated, in *Levy v. Louisiana, supra*:

> "Illegitimate children are not 'non persons'—(but) 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.
>
> Why should the illegitimate child be denied rights merely because of his birth out-of-wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?"

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution mandates that the discriminatory laws penalizing an innocent child based upon the marital status of her parents must and should be overturned. The classification

and differentiation in treatment are justified by *no legitimate state interest compelling or otherwise*. (*Weber v. Aetna Casualty & Surety Co., supra*, 406 U.S. at 176.)

A child is a child is a child.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

IRA RICHARD BENNETT
Attorney for Petitioner

INGRID GHERMAN
Of Counsel

APPENDIX A—ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK COURT OF APPEALS DATED JULY 3, 1986

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the third day of July A.D. 1986

PRESENT, HON. SOL WACHTLER, *Chief Judge, presiding.*

2-14 Mo. No. 621 & 530

In the Matter of Kathy G. J. (Anonymous),

Appellant-Respondent,

vs.

ARNOLD D. (Anonymous),

Respondent-Appellant.

A motion having heretofore been made herein upon the part of the petitioner appellant-respondent for leave to appeal to the Court of Appeals &c., and a cross-motion having heretofore been made herein upon the part of the respondent-appellant for leave to appeal to the Court of Appeals and for a stay in the above cause, papers having been submitted on the motion and cross-motion and due deliberation having been thereupon had, it is

Appendix A

ORDERED, that the said motion and cross-motion be and the same hereby are each dismissed upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution.

s/ Donald M. Sheraw

DONALD M. SHERAW
Clerk of the Court

APPENDIX B—DECISION OF THE APPELLATE DIVISION OF THE STATE OF NEW YORK SECOND JUDICIAL DEPARTMENT DATED APRIL 7, 1986

April 7, 1986

SUPREME COURT : APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

NIEHOFF, J.P., LAWRENCE, EIBER and KOOPER, JJ.

In the Matter of KATHY G. J. (Anonymous),

Appellant,

-against-

ARNOLD D. (Anonymous),

Respondent.

APPEALS by petitioner from, (1) stated portions of an interlocutory order of the Family Court (Bruce M. Kaplan, J.), dated June 7, 1984 and entered in Queens County, which, *inter alia*, awarded her only the sum of $244.15 per week as support for the daughter of the parties and (2) stated portions of a dispositional order of the same court, dated June 25, 1984, and entered upon the interLocutory order.

Ira Richard Bennett, New York, N.Y. (Lawrence H. Bloom of counsel), for appellant.

Appendix B

Herschocopf, Stevenson, McConnell & Tannenbaum, New York, N.Y. (Samuel Tannenbaum of counsel), for respondent.

Robert Abrams, Attorney-General, New York, N.Y. (Harvey M. Berman, Maryellen Weinberg and Robert J. Schack of counsel), in support of the constitutionality of Family Court Act §§ 513 and 545.

NIEHOFF, J. P.

On May 21, 1980, in a paternity proceeding in the Family Court, Queens County, before Judge Bruce M. Kaplan, the respondent, a world-famous entertainer, (a) was adjudged to be the father of petitioner's out of wedlock child Jennifer, who was born in October 1976, (b) was directed to pay temporary support, including a lump sum payment of $5,000, and (c) the matter was set down for a hearing on support. This court affirmed the order entered on that determination in *Matter of Kathy G. J. v Arnold D.* (80 AD2d 896).

After the hearing on support, which lasted 10 days and produced a transcript over 800 pages long, Judge Kaplan rendered a decision in which he determined the weekly needs and expenses of the child as follows:

Shelter	$104.00
Food	50.00
Clothing	48.00
Entertainment	10.00

Appendix B

Dining out	12.00
Travel	25.00
Parties	8.00
	$257.00
	per week or
	approximately $13,364.00
	per year.

In addition, the Judge, relying upon the evidence which established that (1) the child is intellectually gifted with a superior academic potential and the capacity to benefit from private school education, and (2) the father has the means to provide for such an education, ruled that this is a case where "special circumstances * * * justify the conclusion that the cost of private school education is a proper element of support for Jennifer". He went on to determine that a maximum of $12,000 per year should be expended for private school expenses, including transportation, books, meals, contributions, activities fees, charges and uniforms.

The father was ordered to pay 95% of the child's total weekly expenses and 95% of the cost of the private school education. The mother was to be responsible for the remaining 5% of Jennifer's expenses.

Thus the father was charged with weekly support for eight-year old Jennifer of $244.15 per week (95% of $257 per week), and a maximum of $11,400 per year or approximately $219.23 per week for private school expenses (95% of $12,000 per year), for a total of $24,095.80 per year, or approximately $463.38 per week.

Finally, the father was directed to furnish comprehensive medical, dental and prescription insurance coverage for the infant,

and to pay 95% of any deductible.

In arriving at the foregoing decision Judge Kaplan wrote:

> "The Court will make its award of child support pursuant to F.C.A. §§ 513 and 545 based on a consideration of:
>
> 1) the income and expenses of Respondent.
>
> 2) the income and expenses of the child, and
>
> 3) the income and expenses of the Petitioner.
>
> "It will utilize F.C.A. §§ 513 and 545 as its exclusive criteria.
>
> "The Court rejects Petitioner's oft recurring urgings that there can be no permissible distinction between the *manner* in which support is fixed for a marital and a non-marital child". (Emphasis supplied)

On this appeal, the petitioner mother attacks the decision and order of the Family Court on numerous grounds which will be dealt with hereinafter.

At the outset, we note that the petitioner's counsel opens and closes his brief with a rather scathing attack upon the Trial Judge's fairness. Initially he argues, *inter alia*, that the court was preoccupied with marriage and "honored social traditions", as a consequence of which it was blinded "from a full and fair consideration of *the rights of the child* in this instant proceeding".

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After then launching a lengthy assault on virtually every aspect of the decision, he winds up his argument with the assertion that "the predisposition and preoccupation of the Trial Court with distinguishing the rights of 'non-marital' children from those of 'marital children', and the bias of the Court against petitioner and her counsel resulting from attempts to abrogate all distinctions and to preserve the rights of the child, did wrongfully affect the final determination of support". The brief ends with the conclusion that the orders appealed from should be reversed, and the matter should be remitted to the Family Court for further proceedings before a different Judge.

After a careful and objective reading of the record and decision of the trial court, we are satisfied that the claim that Judge Kaplan was guilty of bias is unfounded. Any such charge must be based on an out-of-context reading of certain statements made by the Judge in the course of his decision, because when the decision is read in its entirety, it is abundantly clear that Judge Kaplan made no moral judgments in reaching his decision, and did not treat Jennifer unfairly. On the contrary, he demonstrated a thoughtful concern for the welfare of the child. While we have concluded that his dispositional order should be modified in several particulars, that conclusion does not result from any belief that he was biased in this proceeding, but from a difference of opinion as to the manner in which certain issues should be resolved.

Lest there be any misunderstanding, we wish to state unequivocally that in arriving at the conclusions which follow, we, too, pass no moral judgment on either the petitioner or the respondent. We recognize that our foremost concern in addressing the issues raised on this appeal must be to assure the fair treatment of Jennifer, who had no control as to the circumstances of her birth, or the lack of marital status of her parents.

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We turn now to an examination of the statutes which govern the obligation of parents to support their children.

New York law prescribes parental support of the out-of-wedlock child br statutory provision separate and different from those for the child born of a marriage. Thus, Family Court Act § 413 concerns parental support of marital children and reads as follows:

> "1. Except as provided in subdivision two of this section, the parents of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, may be required to pay for such child's care, maintenance and education a fair and reasonable sum according to their respective means, as the court may determine and apportion. The court shall make its award for child support after consideration of all relevant factors, including: (i) the financial resources of the parents and those of the child; (ii) the physical and emotional health of the child, and his or her educational or vocational needs and aptitudes; (iii) where practical and relevant, the standard of living the child would have enjoyed had the family remained intact; (iv) where practical and relevant, the tax consequences to the parties; and (v) the non-monetary contributions that the parents will make towards the care and well-being of the child.
>
> "2. Nothing in this article shall impose any liability upon a person to support the adopted child of his or her spouse, if such child was adopted after the

adopting spouse is living separate and apart from the non-adopting spouse pursuant to a legally recognizable separation agreement or decree under the domestic relations law. Such liability shall not be imposed for so long as the spouses remain separate and apart after the adoption".

On the other hand, Family Court Act §§ 513 and 545 concern the support of children born out of wedlock and provide:

"Each parent of a child born out of wedlock is liable for the necessary support and education of the child and for the child's funeral expenses. If a parent dies, an order of support or a judicially approved settlement made prior to that parent's death shall be enforceable as a claim against the deceased parent's estate in an amount to be determined by the Surrogate's court not greater than is provided in said order or settlement, having regard to the age of the child, the ability of the surviving parent to support and educate it, the amount of property left by the deceased parent and the number, age and financial condition of those other persons legally entitled to support by the deceased parent during his or her lifetime" (Family Court Act § 513).

"In a proceeding in which the court has made an order of filiation, the court shall direct the parent or parents possessed of sufficient means or able to earn such means to pay weekly or at other fixed periods a fair and reasonable sum according to their respective means as the court may determine

and apportion for such child's support and education, until the child is twenty-one. The order shall be effective as of the date of the application for an order of filiation, and any retroactive amount of support shall be paid in one sum or periodic sums as the court shall direct, taking into account any amount of temporary support which has been paid. The court shall direct such parent to make his or her residence known at all times should he or she move from the address last known to the court by reporting such change to the support collection unit designated by the appropriate social services district. The order may also direct each parent to pay an amount as the court may determine and apportion for the support of the child prior to the making of the order of filiation, and may direct each parent to pay an amount as the court may determine and apportion for (a) the funeral expenses if the child has died, (b) the necessary expenses incurred by or for the mother in connection with her confinement and recovery, and (c) such expenses in connection with the pregnancy of the mother as the court may deem proper. Subsequently, for good cause shown, support may be continued in the discretion of the court" (Family Court Act § 545).

It will be seen that the statutes regarding marital and nonmarital children are analogous, in that both statutory schemes call for parental support of children in a fair and reasonable sum, according to the parents' respective means. They differ in that section 413 (relating to a marital child) includes a list of factors to be considered by the court in making its award of child

support. However that may be, the factors listed in Family Court Act § 413 for consideration by the court do not dictate that marital children necessarily receive a greater level of support than nonmarital children. These factors merely guide the court in assessing the relevant circumstances before awarding support to the child of a marriage. Family Court Act §§ 513 and 545 impliedly call for a similar assessment of relevant circumstances when determining the amount of support for a child born out of wedlock, although no enumerated factors are listed in those statutes, as in section 413.

In reviewing the statutes regarding support of marital and nonmarital children, we find them to be substantially the same. The only potentially significant difference between them is the reference in Family Court Act § 413 to the marital standard of living, which is one of the listed factors to be considered in fixing the support of a marital child "where practical and relevant".

The reason for this distinction is an important, valid and constitutional one. Using the marital standard of living as a guidepost in determining a marital child's support decreases the possibility that such a child will have to face the additional trauma of adjusting to a new standard of living, while adjusting to all of the other changes engendered by the breakup of a marriage.

As Judge McLaughlin of the Family Court of Onondaga County wrote in *Ellen N. v Stuart K.* (88 Misc 2d 280, 286):

> "The situation of a legitimate child under article 4 is different than that of a natural child under article 5. The child in an article 4 proceeding has usually lived in a household which included both of his parents. Thus the legislative reason for

> allowing the child to receive support according to his father's standard of living is to maintain that child's standard of living. Otherwise, the child would have to cope with adjusting to another economic standard of living in addition to dealing with the emotional crises that confront that child due to the breakup of his family. The legislative interest in easing the burdens of a child from a separated family is a valid concern of the government, in light of its duty to act in the best interests of the child. Therefore, the distinction between the support awards test of sections 413 and 513 of the Family Court Act cannot be considered either 'patently arbitrary' or irrationally related to a governmental interest".

However, in the case of most nonmarital children, as in the case at bar, consideration of "the standard of living the child would have enjoyed had the family remained intact" is neither "practical" nor "relevant" (Family Court Act § 413) since there was never any prior family relationship and concomitant standard of living to use as a basis for comparison when awarding support. Therefore, this consideration, while proper in determining the amount of support for a marital child "where practical and relevant", obviously should play no part in determining the amount of support for a nonmarital child whose parents never lived together.

This is not to say that Family Court Act § 545 precludes the consideration of this or any other factor under appropriate circumstances. In fact, in cases such as *Matter of Carolyn C. v Frank G.* (106 Misc 2d 510), where the parents of a nonmarital child established a "nonmarital family" and fashioned a standard

of living together, this standard of living was properly taken into account by the court in determining what was a "fair and reasonable sum" for the child's support notwithstanding the non-marital status of the child.

Although marital and nonmarital children are both to be supported in a fair and reasonable sum, it cannot be overlooked that when formulating an order of support for an out-of-wedlock child a vexing element is always present and must be confronted. As the distinguishing characteristic of the out-of-wedlock child's status is the absence of a legal relationship between the mother and the father, the court is called upon to fix child support in such amount as meets the child's needs while not raising the mother's standard of living, for to raise her standard of living through the vehicle of child support would constitute the imposition of an unauthorized obligation on the part of the father toward the mother. In *Schaschlo v Taishoff* (2 NY2d 408, 411-412), our Court of Appeals recognized the existence of this problem and wrote:

> "We find nothing to indicate * * * that the 'station in life of its mother' was intended to serve as a fixed and invariable maximum, rendering immaterial the father's means except insofar as they suffice to meet this maximum. If such were the case it would mean that an illegitimate child born to an impoverished woman or one of obviously low station would have to suffer the added misfortune of a meager support award, sufficient only to provide for his needs at that humble level, regardless of the father's ability to afford a comfortable or advantageous existence * * * Nor is the father's financial ability

> the sole criterion. As the statute makes plain, a court, in fixing the measure of support, must enter an order taking into account the mother's station in life and the father's financial ability".

In short, a fair balance must be struck, taking into consideration all relevant circumstances. As we read them, both Family Court Act §§ 413 and 545 seek, in substance, to achieve the same end, that is, to provide for the needs of the particular child, whether marital or nonmarital, according to the circumstances of the parents and the child. Simply because another child of the same father, in different circumstances, reseives more support, does not mean that equal protection has been denied by the statutes; it only means that the relevant circumstances differ. Under New York's statutory scheme, it is entirely possible that marital children within the same family could receive different levels of support due to their special needs, and the surrounding circumstances. So too, marital and nonmarital children of the same father may receive different dollar amounts of support due to their particular circumstances. The circumstances dictate the results, not the statutes, and there is a legitimate basis for the differing treatment. Equal protection of the law does not mandate absolute equality of treatment. It only requires that all persons in the same class be treated alike under like circumstances and conditions. Jennifer was entitled to receive support in accordance with her particular needs. She was not denied equal protection of the law merely because she did not automatically receive the same level of support as the respondent's other four children.

After acknowledging that "the Legislature utilized different words in the operative statutes relating to 'legitimate child support' and 'illegitimate child support,' " the petitioner takes issue with Judge Kaplan in these words:

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> "The Court below interpreted the difference as indicative of *separate standards*, concluding that JENNIFER D * * * is not entitled to the same level of support from her natural father as she would have been had the same man been married to her mother".

In a word, petitioner attacks the order appealed from because Judge Kaplan disagreed with petitioner's contention that respondent "has a duty to provide for his fifth child, JENNIFER, *in the same manner* and *to the same extent* as he provides for his other four children".

In arriving at an award of child support for Jennifer, Judge Kaplan considered those factors which were relevant to Jennifer's circumstances. He concluded that her needs and circumstances were the governing factors, and that she was not necessarily entitled to be supported in the same manner, and to the same extent as the respondent's marital children. We can find no error in that conclusion.

The petitioner and the respondent never lived together. Their child Jennifer never became accustomed to the standard of living which the respondent's income as a world famous entertainer could provide. Therefore, Judge Kaplan's decision did not deprive her of something to which she had, by circumstances, become accustomed. Rather, the decision provided for her support according to her "needs", while keeping in mind her father's ability to pay. We note the following excerpts from Judge Kaplan's opinion which demonstrate his awareness of his obligation to adequately provide for Jennifer's needs in the light of the father's ability to pay:

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> "Lest there be any misapprehension of the Court's position, this Court wishes it to be entirely clear that the amount awarded for Jennifer's support was not diminished by as much as a penny because Respondent is presently supporting his 4 marital children
>
> * * *
>
> "[It] is certain that Jennifer will receive a level of support that more than meets a level that is fair and reasonable."

Nor did Judge Kaplan punish Jennifer because of the petitioner's modest station in life and the fact that the petitioner has been receiving public assistance since 1976. This is clear from the following quotation from his opinion.

> "It is understandable that Petitioner wished to avoid the dilemma of having the child's needs implicitly measured by the amounts she was able to expend given her means which are extraordinarily modest relative to those of Respondent.
>
> "It has long been the law of the state that the child's needs were not to be measured solely by the mother's means, a precept that has been applied with ever increasing vigor. Indeed the teachings of *Schaschlo v Taishoff*, 2 N.Y.2d 408; and *Nardone v Coyne*, 13 A.D.2d 819 (4th Dept., 1965), aff'd 18 N.Y.2d 626 are part of the mainstream of the evolving and expanding rights

of non-marital children.

> "The fact that the custodial parent of a non-marital child lacks the financial resources to provide adequately for the child's needs does not mean that those needs do not exist. Rather, it means that the custodial parent is presently incapable of meeting those needs absent significant contribution from the non-custodial parent.
>
> "While it is incumbent on Petitioner to demonstrate Jennifer's needs, it is not necessary for her to do so solely through proof of expenses actually incurred. It is enough that Petitioner prove by competent evidence that Jennifer has particular needs, and what sums are necessary to meet them".

Indeed the amounts fixed by Judge Kaplan for Jennifer,s needs, amounting to $13,364 per year, plus medical insurance and $12,000 per year for private school, are abundant evidence that in arriving at his decision he was not influenced by the mother's modest station in life.

Based on the evidence contained in the record, we are satisfied with the fairness of Judge Kaplan's determination that Jennifer is entitled to $257 per week in support, a maximum of $12,000 a year for private schooling, and health insurance coverage. However, on the record before us we are disinclined to find that the petitioner should be held responsible for 5% of Jennifer's expenses, including 5% of any medical insurance deductible. Although it may well be that petitioner, who is now on public assistance, could obtain some form of employment, the record discloses that she has not been gainfully employed for some years

and that she has been devoting herself to the care of Jennifer. We do not believe we should ignore the lack of financial means of the mother, and engage in speculation as to her potential earning power, or ignore her nonmonetary contributions in the rearing of Jennifer. It would appear to us to be unfair at this juncture to require her to provide 5% of Jennifer's support, especially in light of the respondent's high income. We also deem it unfair that Jennifer's choice of schools would be limited by the fact that petitioner would have to provide 5% of the cost of her education. Therefore, we conclude that, under these circumstances, the respondent should provide 100% of Jennifer's support.

It is argued that the Family Court failed to properly include the extracurricular and cultural needs of Jennifer as comprising part of the child's "needs". The question is asked: "Is she not entitled to piano lessons, ballet classes, singing lessons, art classes, etc?". The charge is also made that "[s]imilarly offensive was the failure of the court below to direct Respondent to pay summer camp and related transportation expenses in order to assure JENNIFER an opportunity to develop on a social level with members of her own age group in [a] recreational setting". There is also the complaint that the respondent was not directed to obtain a policy of insurance on his life for the benefit of Jennifer, or to provide for college expenses.

Examination of the record discloses that the petitioner never requested the foregoing items nor offered any testimony as to their amounts or even their necessity. That being so, we decline to include those items in Jennifer's support award. Insofar as Jennifer's college education is concerned, this can be provided for at a later time by way of modification, if and when Jennifer expresses a desire to continue her education.

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Several other items warrant discussion. The Family Court should have ordered reimbursement to petitioner of $450 representing costs incurred by the petitioner for Jennifer's attendance at nursery school, and $100 for the cost of educational testing performed to determine Jennifer's intellectual abilities.

We also hold that the effective date of the support determination should be the date of the petitioner's application for an order of filiation, as required by Family Court Act § 545 which provides:

> "The order [of support] *shall be effective as of the date of the application for an order of filiation*, and any retroactive amount of support shall be paid in one sum or periodic sums as the court shall direct, taking into account any amount of temporary support which has been paid" (emphasis supplied).

Hence, Jennifer is entitled to support retroactive to October 8, 1977, and the matter must be remitted to the Family Court to make the necessary computations.

With regard to the petitioner's objections regarding the conduct of the hearing itself, Judge Kaplan's refusal to direct the appearance of the respondent at the support hearing was not error. The information available to the petitioner in the income tax returns and financial statements she received from the respondent, which covered a five year period, was more than sufficient in determining his ability to support their daughter. Further information was available to the petitioner through the respondent's financial representative, yet she declined to take advantage of this opportunity. In light of the foregoing, petitioner

can hardly argue now that the testimony of the respondent himself is necessary to clarify his financial position.

Judge Kaplan's refusal to allow pretrial financial disclosure as to the manner in which the respondent provides for his four legitimate children was also proper. Since a child's support under both Family Court Act §§ 413 and 545 is determined by the particular child's circumstances and the parents' means, the level of support received by the child's siblings, whether legitimate or illegitimate, is irrelevant.

We have considered the petitioner's other contentions and find them to be without merit.

LAWRENCE, EIBER and KOOPER, JJ., concur.

APPENDIX C—ORDER ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK SECOND JUDICIAL DEPARTMENT DATED APRIL 7, 1986

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 7, 1986.

HON. JAMES F. NIEHOFF, Justice Presiding,
HON. CHARLES B. LAWRENCE,
HON. GERALDINE T. EIBER,
HON. SYBIL HART KOOPER. *Associate Justices*

In the Matter of Kathy G. J. (anonymous),

Appellant,

v

Arnold D. (anonymous),

Respondent.

Order on Appeal from Interlocutory Order.

In the above entitled cause, the above named Kathy G. J. (anonymous), petitioner, having appealed to this court from (1) stated portions of an interlocutory order of the Family Court, Queens County, dated June 7, 1984, which, *inter alia*, awarded her only the sum of $244.15 per week as support for the daughter of the parties and (2) stated portions of a dispositional order of the same court, dated June 25, 1984, and entered upon the interlocutory order; and the said appeal having been Ira Edward Bennett, Esq., of counsel for the appellant, argued by Samuel

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Tannenbaum, Esq., of counsel for the respondent and argued by Robert J. Schack, Esq., of for Robert Abrams, Attorney General, in support of the constitutionality of Family Court Act §§ 513 and 545; due deliberation having been had thereon; and upon OPINION by NIEHOFF, J.P., and this court's decision slip hereto fore filed and made a part hereof, it is

ORDERED that the appeal from the interlocutory order is hereby dismissed; no appeal lies as of right from an intermediate order of the Family Court (Family Court Act § 1112[a]), and it is further

ORDERED that the dispositional order appealed from is hereby modified, on the facts, by (1) deleting from the first decretal paragraph the words "95% of $1,785.50, to wit, the sum of $1,696.23,"; and substituting therefore the sum of "$2335.50" and, after the word "materials" in the first decretal paragraph adding the words "in the sum of $450 with respect to Our Savior Lutheran Nursery School, and in the sum of $100 with respect to educational Testing"; (2) deleting from the second decretal paragraph the words "98% of the sum of" and "to wit", the sum of $244.15,"; (3) deleting the fourth decretal paragraph and substituting therefore a provision that respondent pay retroactive temporary weekly child support in the sum of $257 from October 8, 1977 to June 21, 1984; (4) deleting the sixth decretal paragraph in its entirety; (5) deleting from the seventh decretal paragraph the words 95% of," and (6) deleting from the from the ninth decretal paragraph the phrase 95% as it appears on two occasions in that paragraph and substituting therefore the phrase 100%; and, as so modified, the said order insofar as appealed from ia unanimously affirmed, with costs to petitioner, and the matter is hereby remitted to the Family Court, for calculation of the respondent's arrears in temporary weekly child support payments

under paragraph 4 thereof, in accordance with the said OPINION of NIEHOFF, J.P.

LAWRENCE, EIBER and KOOPER, JJ., concur.

Enter:

MARTIN H. BROWNSTEIN
Acting Clerk of the Appellate Division.

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JAMES F. NIEHOFF, J.P.
CHARLES B. LAWRENCE
GERALDINE T. EIBER
SYBIL HART KOOPER, JJ.

____ AD2d ____ A - October 8, 1985

980 E
981 E

In the Matter of Kathy G. J. (anonymous), appellant, v Arnold D. (anonymous), respondent.

Ira Richard Bennett, New York, N.Y. (Lawrence H. Bloom of counsel), for appellant.

Herschocopf, Stevenson, McConnell & Tannenbaum, New York, N.Y. (Samuel Tannenbaum of counsel), for respondent.

Robert Abrams, Attorney-General, New York, N.Y. (Harvey M. Berman, Maryellen Weinberg and Robert J. Schack of counsel), in support of the constitutionality of Family Court Act §§ 513 and 545.

Appeal from an interlocutory order of the Family Court, Queens County (Kaplan, J.), dated June 7, 1984, dismissed. No appeal lies as of right from an intermediate order of the Family Court (Family Court Act § 1112[a]).

Dispositional order of the same court, dated June 25, 1984, modified, on the facts, by (1) deleting from the first decretal paragraph the words "95% of $1,785.50, to wit, the sum of $1,696.23,"; and substituting therefore the sum of $2,335.50

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and,after the word "materials" in the first decretal paragraph adding the words "in the sum of $450 with respect to nursery school, and in the sum of $100 with respect to educational testing"; (2) deleting from the second decretal paragraph the words "95% of the sum of" and "to wit, the sum of $244.15,"; (3) deleting the fourth decretal paragraph and substituting therefore a provision that respondent pay retroactive temporary weekly child support in the sum of $257 from October 8, 1977 to June 21, 1984; (4) deleting the sixth decretal paragraph in its entirety, (5) deleting from the seventh decretal paragraph the words "95% of," and (6) deleting from the ninth decretal paragraph the phrase "95%" as it appears on two occasions in that paragraph and substituting therefore the phrase "100%". As so modified, order affirmed insofar as appealed from, with costs to the petitioner, and matter remitted to the Family Court for calculation of the respondent's arrears in temporary weekly child support payments under paragraph 4 thereof, in accordance with the opinion herewith.

OPINION by NIEHOFF, J.P.

LAWRENCE, EIBER and KOOPER, JJ., concur.

April 7, 1986 IN RE KATHY G. J. v ARNOLD D. 980 N
981 E

APPENDIX D—ORDER APPEALED FROM—FAMILY COURT OF THE STATE OF NEW YORK COUNTY OF QUEENS DATED JUNE 25, 1984

At a term of the Family Court of the State of New York, held in and for the County of New York, at 60 Lafayette Street, New York, New York on June 25, 1984.

PRESENT:

HON. BRUCE M. KAPLAN,

Judge.

Docket No. P7212/77

In the Matter of the Paternity Petition of

KATHY G. JETTER,

Petitioner,

-against-

ARNOLD DORSEY,

Respondent.

ORDER OF PERMANENT SUPPORT

The issues as to permanent child support for Jennifer Diane Jetter, born October 23, 1976, having come on for a Hearing before Mr. Justice Bruce M. Kaplan at the Courthouse, at 283 Adams Street, County of Kings, Borough of Brooklyn, City and

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State of New York, on June 13, June 14, June 15, June 16, June 17, June 20, June 21, July 18, July 19 and July 20, 1983, and there having appeared before this Court petitioner and her attorney, Ira Richard Bennett, of 225 Broadway, New York, New York 10007, and respondent having appeared only by his attorneys, DiFalco, Amhurst Smithson Tannenbaum & Duval, of 605 Third Avenue, New York, New York 10158, by Samuel Tannenbaum, Of Counsel, and the issues having been tried, and the proofs of both parties having been adduced, and their respective counsel having been heard, and the Court having, after due deliberation, made and filed a Decision in writing on June 7, 1984, it is

ORDERED, that respondent pay 95% of $1,785.50, to wit, the sum of $1,696.23, representing certain costs heretofore incurred by petitioner in the sum of $875.00 with respect to Glendale Baptist School; in the sum of $580.50 with respect to our Savior Lutheran School; and in the sum of $330.00 with respect to certain home study teaching materials, and it is further

ORDERED, that on each and every Friday respondent pay 95% of the sum of $257.00, to wit, the sum of $244.15, representing support for said infant in the sum of $104.00 per week for rent; in the sum of $50.00 per week for food; in the sum of $10.00 per week for entertainment; in the sum of $8.00 per week for parties; in the sum of $12.00 per week for dining out; in the sum of $25.00 per week for travel; and in the sum of $48.00 per week for clothes; until such time as he ceases to owe a duty of support; and it is further

ORDERED, that respondent pay $796.25, representing costs heretofore incurred by petitioner in the sum of $500.00 for obstetrical fees and the sum of $296.25 for medical, laboratory and pharmaceutical expenses for said infant; and it is further

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ORDERED, that for a period of 103 weeks from June 13, 1982 to June 21, 1984 respondent pay 95% of the difference between temporary weekly child support in the sum of $100.00 heretofore paid by respondent and the above-mentioned weekly sum of $257.00, to wit, 95% of $157.00 which equals a net sum of $144.15 per week and a total sum of $15,091.75 for the 105 weeks; and it is further

ORDERED, that all sums set forth herein required by this Order to be paid by respondent be paid by him or on his behalf to the appropriate Support Collection Unit of the Family Court and that the said Support Collection Unit of the Family Court shall report every six months to the Court with respect to amounts received and paid over and, further, that copies of such accountings shall be available to respondent or his attorneys; and it is further

ORDERED, that the above mentioned sums of $796.25, $1,696.23 and $15,091.75, aggregating the sum of $17,584.23, be paid by respondent or on his behalf within eight days after service upon attorneys for respondent a copy of the Order to be settled herein, with notice of entry; and it is further

ORDERED, that respondent pay the tuition for attendance by the said infant at a fully accredited private school in a sum not to exceed 95% of $12,000.00 per year, such sum to include transportation, books, meals, contributions, activities fees, charges and uniforms; and it is further

ORDERED, that Respondent shall pay directly for his aliquot portion of the foregoing school and attendant expenses as set forth hereinbefore, upon presentment of bills for same; and it is further,

ORDERED that the Respondent is directed to name his

daughter, JENNIFER DIANE DORSEY, as a named beneficiary, providing extensive health coverage under the Respondent's existing medical, dental and prescription insurance plans coverage; or, in the alternative, the Respondent may, at his option, obtain and secure separate insurance company plans, at his sole cost and expense, wherein the child, JENNIFER DIANE DORSEY, is named as beneficiary of medical, dental and prescription coverage; that the Respondent shall, within 20 days from the date of entry of the instant Order, provide the Petitioner with proof of the aforesaid insurance coverage, and provide the Petitioner with suitable insurance identification cards so as to enable the Petitioner to use said insurance coverage on behalf of JENNIFER DIANE DORSEY; that in the event the insurance company plans provide for any deductible as to medical, dental or prescription coverage, as to said infant, then, in that event, the Respondent shall be responsible for, and pay, 95% of any deductible amount. Payment shall be made by Respondent as to 95% of any amount deductible under said insurance coverage plans, upon presentation of bills indicating sums due; Respondent shall pay said sums directly to any treating hospital, doctor and dentist, and to the Petitioner, in the event Petitioner has prepaid for any prescription medications on behalf of JENNIFER DIANE DORSEY. That the obligation of the Respondent hereunder shall continue until such time as the Respondent ceases to owe a duty to support his daughter, JENNIFER DIANE DORSEY; and it is further,

ORDERED, that Ira Richard Bennett, counsel for petitioner, is directed to file with this Court an affidavit of his services rendered to date in this proceeding, as well as an itemized account of any disbursements for which he seeks recovery from respondent; and it is further

ORDERED, that there be filed with this Court an affidavit

of services and an itemization of disbursements by any other attorney seeking an award of fee from respondent for services rendered to date in this proceeding or seeking recovery of disbursements and counsel for petitioner so notify such attorneys in writing; and it is further

ORDERED, that there be filed with this Court an affidavit of services by any other attorney who will receive from or share with Ira Richard Bennett any part of any fee awarded to him for services rendered in this proceeding; and it is further

ORDERED, that the above affidavits be filed with this Court by July 5, 1984; and it is further

ORDERED, that unless counsel stipulate otherwise, a Hearing on the application for counsel fees shall be held on July 23, 1984.

ENTER

s/ Bruce M. Kaplan

BRUCE M. KAPLAN,
Judge of the Family Court

APPENDIX E—EXCERPTS OF DECISION AND ORDER OF THE FAMILY COURT OF THE STATE OF NEW YORK: COUNTY OF QUEENS (J. KAPLAN)—DATED JUNE 7, 1984

THE APPROPRIATE STANDARD FOR CHILD SUPPORT

The Court will make its award of child support pursuant to F.C.A. Sections 513 and 545, based on a consideration of: (1) the income and expenses of Respondent (2) the income and expenses of the child and (3) the income and expenses of the Petitioner. It will utilize F.C.A. Sections 513 and 545 as its exclusive criteria.

The Court rejects Petitioner's oft-recurring urgings that there can be no permissible distinction between the manner in which support is fixed for a marital and a non-marital child.

The distinction was clearly intended by the Legislature. This is evidenced by a law passed in 1983 which amended the Domestic Relations Law Section 32, and the Family Court Act Section 413, by enumerating five relevant factors which the Court must take into consideration in fixing a child support award.

At the same time, it was conspicuously silent with regard to F.C.A. Sections 513 and 545.

While it's possible that Jennifer may not be treated in the same manner as Respondent's marital children, such a belief would be speculative and inneluctable conclusion since the Court foreclosed inquiry into the standard of living of Respondent's children.

The thrust of the Supreme Court cases dealing with equal protection of non-marital children is addressed to areas of general rights and entitlements.

Appendix E

The Court reaffirms its adherence to that reasoning. Non-marital children are entitled to qualify for the same statutory benefits respecting the bringing of actions relating to inheritance and survivorship, and to qualify for benefits awarded to persons by virtue of their being the children of a particular father.

It is unwarranted to utilize those holdings in support of the premise that non-marital children are entitled to child support in the same dollar amount as marital children in the absence of identical statutory criteria.

Petitioner's assertion in this regard constitutes a denegration of marriage, an institution occupying a place in the forefront of our most honored social traditions.

An award of child support in a matrimonial action entails recourse to any number of complex factors inextricably intertwined with the marital standard of living.

This fact was made abundantly clear with the passage of L. 1983, Ch. 362, which mandate[1] consideration of all relevant factors including five specific ones, when fixing support for marital children.

It would do violence to the recently articulated will of the Legislature to treat non-marital children in exactly the same way as marital children as it would to permit non-married persons, without formal contract, to obtain equitable distribution.

A. Private School Education

—Petitioner requested that the Order of Support encompass the cost of private school education for Jennifer. In support of

this request, she introduced as (Petitioner's Exhibit 41 in evidence) a report by Dr. Elaine Chapline, based on standard intelligence and psychological tests administered to Jennifer under her supervision. The report noted that Jennifer's performance and verbal I.Q. scored in the superior range. She was found to be intellectually advanced, highly verbal, perceptive, possessed of a great wealth of information, highly observant and a quick learner. Her verbal scores were notably above grade level.

While Jennifer did not manifest any significant problems, she experienced difficulties with perceptual organization that resulted in reading scores well below her potential. The test scores indicated a disparity of development. Notwithstanding those cautions, the test results and testimony reveal that Jennifer is an intellectually gifted child, with a superior academic potential that established that Jennifer has the capacity to benefit from private school education.

86-626

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IN THE MATTER OF KATHY G.J. (ANONYMOUS),

Petitioner,

vs.

ARNOLD D. (ANONYMOUS),

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR RESPONDENT IN OPPOSITION

JOCKE S. STEVENSON
(Counsel of Record)

HERSHCOFF, STEVENSON,
TANNENBAUM & GLASSMAN
Attorneys for Respondent
230 Park Avenue
New York, New York 10169
(212) 661-4000

17pp

QUESTION PRESENTED

Should certiorari be denied where the Decision and Order of New York's Appellate Division: Second Department rests on an adequate state ground and because, in any event, petitioner's claims do not involve issues of public interest or a conflict between two Circuit Courts?

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STATEMENT OF THE CASE

A. The Facts.

The non-marital child was born October 23, 1976. Petitioner's application for an order of filiation was initiated in the New York State Family Court: Queens County in October, 1977. A May 22, 1980 Decision and Order of Family Court Judge Bruce M. Kaplan declared respondent to be the father. The finding of paternity was subsequently affirmed by the New York Appellate Division: Second Department. The said May 22, 1980 Decision and Order also fixed temporary child support at $100.00 per week.

In June and July of 1983 a ten day trial was conducted before Judge Bruce M. Kaplan to fix the amount of permanent child support. The June 7, 1984 Decision and Order of Judge Bruce M.

Kaplan and his separate June 25, 1984 Order (A*26a-30a) found, among other things, that the fair and reasonable sum for weekly child support was $257.00; directed that respondent pay 95% thereof or $244.15 per week; and directed that said $244.15 per week be paid retroactive to June 13, 1982.

B. The Family Court June 7, 1984 Decision and Order.

The June 7, 1984 Decision and Order rejected all claims of petitioner as to non-constitutionality (A31a-32a).

C. The Appellate Division: Second Department Decision and Order.

A unanimous April 7, 1986 Opinion and April 7, 1986 Order of the Appellate Division: Second Department affirmed the

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* References to the Appendix to the Petition herein are indicated by the prefix "A".

Decision and Order and separate Order of Judge Kaplan except as to certain modifications not relevant hereto, to wit, requiring the weekly sum of $257.00 to be paid in full by respondent and requiring payment of said weekly sum to be retroactive to October 8, 1977 (A3a-25a).

The unanimous court rejected petitioner's constitutional claims. Presiding Justice Niehoff, speaking for the unanimous Appellate Division, compared New York Family Court Act Section 413, concerning parental support of marital children, with New York Family Court Act Sections 513 and 545, concerning support of non-marital children (A8a-9a). Justice Niehoff reached the constitutional issue by holding that the two statutes were ". . . substantially the same" and that the "The only potentially

significant difference between them is the reference in Family Court Act Section 413 to the marital standard of living . . ." (Alla). Justice Niehoff explained the difference by stating:

> "The reason for this distinction is an important, valid and constitutional one. Using the marital standard of living as a guidepost in determining a marital child's support decreases the possibility that such a child will have to face the additional trauma of adjusting to a new standard of living, while adjusting to all of the other changes and engendered by a breakup of a marriage." (Alla).

Justice Niehoff then held that all that is required is that ". . . a fair balance must be struck taking into consideration all relevant circumstances." and that the cited Family Court Act sections seek to achieve the same end which is ". . . to provide for the needs of a particular child, whether marital or non-marital, according to the

circumstances of the parents and the child."(A14a). Justice Niehoff dismissed the claim of non-constitutionality by stating:

> "Simply because another child of the same father, in different circumstances, receives more support, does not mean that equal protection has been denied by the statutes; it only means that the relevant circumstances differ." (A14a).

D. The Court of Appeals Order.

By a July 3, 1986 Order the New York Court of Appeals denied petitioner's application for leave to appeal from the said April 7, 1986 Appellate Division Order (A1a-2a) on the ground that the Order sought to be appealed from did not finally determine the paternity proceeding.

ARGUMENT

A. CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE NEW YORK APPELLATE DIVISION: SECOND DEPARTMENT RESTS ON AN ADEQUATE STATE GROUND.

Certiorari should be denied because there is an adequate state ground for the decision of the New York Court of Appeals which precludes this Court's review. Florida v. Casal, 462 U.S. 637, 103 S.Ct. 3100 (1983); Wilson v. Loew's Inc., 355 U.S. 597 (1958); Herb v. Pitcairn, 324 U.S. 117, 125-6 (1945).

Justice Niehoff, speaking for the unanimous Appellate Division, found that, in any event, constitutionality aside, the needs of the child had been fully met and that Judge Kaplan had ". . . demonstrated a thoughtful concern for the welfare of the child" (A7a); that the Decision of Judge Kaplan ". . . provided for her support according to

her . . . 'needs', while keeping in mind her father's ability to pay." (A15a). Judge Niehoff also pointed out the statement by Judge Kaplan in his Decision that support for the child was ". . . not diminished by as much as a penny because Respondent is presently supporting his 4 marital children" (A16a) and the further statement of Judge Kaplan that the child ". . . will receive a level of support that more than meets a level that is fair and reasonable." (A16a).

B. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS PRESENTED NO FEDERAL CONSTITUTIONAL QUESTION MERITING REVIEW.

The case does not, in any event, present any federal constitutional question meriting review. See Cichos v. Indiana, 385 U.S. 76, 80 (1966); Rice v. Sioux City Cemetery, 349 U.S. 70, 78n.2

(1955); McCullough v. Kammerer Corp., 323 U.S. 327, 238-9 (1945); United States v. Rimer, 220 U.S. 547, 548 (1911).

C. CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION FOR WRIT OF CERTIORARI DESIGNATES THE NEW YORK STATE COURT OF APPEALS AS THE COURT TO WHICH THE WRIT SHOULD BE DIRECTED BUT ONLY SEEKS REVIEW OF THE APRIL 7, 1986 ORDER OF THE NEW YORK APPELLATE DIVISION: SECOND DEPARTMENT.

Certiorari must be denied since the New York Court of Appeals is the court to which the writ is directed. The July 3, 1986 Order of the New York Court of Appeals (A1a-2a) merely denied petitioner's application for leave to appeal from the April 7, 1986 Order of the New York Appellate Division. The petition for the writ is directed to the merits of said April 7, 1986 Order of the Appellate Division which is the highest

court of New York that actually ruled on the merits. The July 3, 1986 Order of the Court of Appeals presents no issues to which the petition for a writ is addressed. Certiorari is foreclosed by virtue of the fact that review is available only from a final judgment of the highest court of New York in which a decision could be had and in this instance that court is the Appellate Division and not the Court of Appeals, 28 U.S.C.A. Sec. 1257.

CONCLUSION

CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
November 17, 1986

Respectfully submitted,

JOCKE S. STEVENSON
(Counsel of Record)

HERSHCOPF, STEVENSON,
TANNENBAUM & GLASSMAN
230 Park Avenue
New York, New York 10169
(212) 661-4000
Attorneys for Respondent

No. 86-628

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

In the Matter of KATHY G.J. (ANONYMOUS),

Petitioner,

vs.

ARNOLD D. (ANONYMOUS),

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

ROBERT ABRAMS
Attorney General of the State of New York
Attorney Pro Se
120 Broadway
New York, New York 10271
(212) 341-2558

O. PETER SHERWOOD
Solicitor General

ROBERT J. SCHACK
HARVEY M. BERMAN
Assistant Attorneys General
Of Counsel

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Statement of the Case

A. Family Court Proceedings

Petitioner is the unmarried mother of Jennifer D. (Anonymous). The child was born October 23, 1976. On October 8, 1977, petitioner commenced a paternity proceeding, pursuant to Article 5 of the New York Family Court Act ("F.C.A."), against respondent in Family Court, Queens County. Respondent is married to another woman and has four marital children. (Petition ["Pet."] 2). He and petitioner were never married and never lived together. (Pet. 15a).

On May 21, 1980, following a hearing, Family Court Judge Bruce M. Kaplan issued a decision and order finding respondent to be Jennifer's father and requiring him to pay $100 a week temporary child support. (Pet. 2). The Appellate Division, Second Department, affirmed. 80 A.D.2d 896 (1980).

On June 7, 1984, following a hearing, Judge Kaplan issued a decision and interlocutory order setting Jennifer's permanent support needs at $257 a week, with respondent liable for 95 percent of this amount, retroactive to June 13, 1982, the earliest date for which petitioner had proven her expenses. (Appendix to this brief ["Resp."] 37a). He also granted up to $12,000 a year for school expenses. On June 25, 1984, Judge Kaplan entered a dispositional order based upon the interlocutory order. (Pet. 3-4).

In one of the portions of Judge Kaplan's decision that petitioner notably omits from her appendix*, he found that

* Contrary to ordinary practice, see, e.g., Supreme Court Rule 30.5, the petition presents a collection of excerpts from the trial court decision as if it were a complete section of the opinion, without indicating that there are six major elisions from the body of the excerpts. The decision is set out in full in the Appendix at pages 1a to 39a below.

with the award he was making,

> "it is certain that Jennifer will receive a level of support that more than meets a level that is fair and reasonable." (Resp. 2a).

The trial judge further found that petitioner repeatedly lied about her expenses (Resp. 30a-33a) and

> "seemingly blurred the distinction between sums to be used for her daughter's benefit and those for herself." (Resp. 33a).

B. The Appellate Division Order

Petitioner appealed to the Appellate Division, Second Department, from the interlocutory and dispositional orders.* She claimed that child support for non-marital children was unconstitutionally determined under a different statutory standard (F.C.A. §§ 513, 545) than child support for marital children (F.C.A. §

---

* The Attorney General intervened on the appeal as a party respondent in defense of the constitutionality of State statutes, pursuant to New York Civil Practice Law and Rules ("C.P.L.R.") § 1012(b). (Pet. 22a).

413). The Appellate Division disagreed. It found that all but one of the factors enumerated under the marital child support statute for consideration in marital child support decisions are impliedly to be considered in non-marital child support decisions as well. The only potential difference between the statutes is that under Article 4, the courts are to consider the standard of living of a marital family where "practical and relevant", while in Article 5 proceedings, consideration of the standard of living requires some showing that the child's parents had formed a "non-marital family". (Pet. 11a; 116 A.D.2d 247).

The court found that the difference in the wording of the statutes is reasonable because marital families usually have lived together. As a result, consideration of the family's standard of

living -- where "practical and relevant" -- is appropriate and may save the child some of the trauma of the divorce. (Pet. 12a). In contrast, the parents of a child involved in a paternity proceeding usually have not lived as a non-marital family, and consideration of "the family's" standard of living is thus neither "practical" nor "relevant". (Pet. 12a). Where the parents of a non-marital child have in fact lived together as a non-marital family and established a standard of living, the Appellate Division observed, the courts have properly ruled that the standard of living is to be taken into account in determining the support level, "notwithstanding the non-marital status of the child." (Pet. 12a-13a, citing Matter of Carolyn C. v. Frank G., 106 Misc. 2d 510 [Fam. Ct. N.Y. Co. 1980]). The distinction in the wording of the statutes thus has "an important,

valid and constitutional" reason at its basis. (Pet. 11a).

Accordingly, the Appellate Division affirmed the dispositional order*, but modified it to cover certain school expenses, to make respondent liable for 100 percent of Jennifer's support, and to change the effective date of the order to the date it was first applied for, October 8, 1977. The matter was remitted to the Family Court for calculation of arrears. (Pet. 25a).

C. Motions For Leave To Appeal To The Court of Appeals

Petitioner and respondent moved separately in the New York Court of Appeals for leave to appeal. Respondent also applied for a stay. (Pet. 4). The Court of Appeals denied the motions on July 3, 1986. (Pet. 1a; 68 N.Y.2d 713).

---

* The court held that no appeal lay from the interlocutory order and dismissed that appeal. (Pet. 22a)

In apparent reference to the provision in the Appellate Division's order remitting the proceeding for calculation of arrears, the Court of Appeals held that the order appealed from was not sufficiently final under the New York Constitution for review. (Pet. 2a). See N.Y. Const., Art. 6, § 3(b)(1), (6).

POINT I

THIS COURT LACKS JURISDICTION TO REVIEW THE COURT OF APPEALS' ORDER AND PETITIONER HAS NOT SOUGHT REVIEW OF THE APPELLATE DIVISION'S ORDER.

Although the petition for writ of certiorari is labelled in caption and body as directed to the Court of Appeals, the argument in the petition actually challenges the Appellate Division's April 7, 1986, order upholding the constitutionality of F.C.A. §§ 513, 545.

Assuming arguendo that the Appellate Division order was sufficiently final for

the purposes of this Court's jurisdiction, see New York v. Cathedral Academy, 434 U.S. 125, 128 n. 4 (1977), the petition should have been directed to that order inasmuch as the Court of Appeals' dismissal was on jurisdictional grounds.* R.J. Reynolds Tobacco Co. v. Durham County, ___U.S.___, 55 U.S.L.W. 4034, 4036 (December 9, 1986). Petitioner's failure to seek review of the correct order requires denial of her petition.** See 28 U.S.C. § 1257(3);

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* Since the Appellate Division order was not final under New York law, there could not be an appeal, either by leave (N.Y. Const., Art. 6, § 3[b][6]; C.P.L.R. § 5602[1][i]) or as of right (N.Y. Const., Art. 6, § 3[b][i]; C.P.L.R. § 5601[b][1]).

** Petitioner alleges that the statute conferring jurisdiction is 28 U.S.C. § 2103. (Pet. 2). Section 2103, however, authorizes an improvidently taken appeal to be regarded as a petition for certiorari. Since there was no appeal here in the first instance, petitioner has failed to plead a jurisdictional basis for her petition.

R.J. Reynolds Tobacco Co. v. Durham County, supra, 55 U.S.L.W. at 4036; Norfolk & Suburban Turnpike Co. v. Virginia, 225 U.S. 264, 267-9 (1921); Western Union Telegraph Co. v. Crovo, 220 U.S. 364, 366 (1911).*

POINT II

THE PETITION RAISES NO ISSUE MERITING REVIEW BY THIS COURT.

Assuming arguendo that petitioner had sought review of the Appellate Division's order and that it was otherwise proper for this Court to review that order, the Court should in any event deny certiorari. Petitioner has not shown that the case presents a substantial Federal question or a conflict with the

* Petitioner could hardly maintain, and does not, that this Court has jurisdiction to decide the sole question determined by the Court of Appeals, i.e., whether the Appellate Division order finally determined the proceeding within the meaning of the New York State Constitution.

decision of another State court of last resort or of a Federal court of appeals.

1. Non-marital and Marital Children Are Provided Equal Treatment under New York Law in the Consideration of Child Support Orders.

The petition should be denied because no serious argument can be made that petitioner was denied equal protection of the laws. With one apparent exception, the same factors are impliedly to be considered under the non-marital child support statutes (F.C.A. §§ 513, 545) as under the marital child support law (F.C.A. § 413). (Pet. 11a). The only difference between the statutes is that section 413 provides that "where [it is] practical and relevant", the court is to consider

> "the standard of living the [marital] child would have enjoyed had the family remained intact."

F.C.A. § 413(1)(iii). However, as the Appellate Division made abundantly clear,

under section 545, a non-marital family's standard of living will be considered in determining support for a non-marital child, if such a unit ever existed. Similarly, a marital family's standard of living is only to be considered where "practical and relevant". There is thus no real distinction between the statutes. (Id.).

Moreover, petitioner does not claim to have established a non-marital family with respondent. (Pet. 15a). She thus fails to show that she would have qualified for different treatment than she received if the non-marital child support statutes were identical to the marital child support provision.

2. The Review of Concurrent Findings of Fact.

Petitioner suggests that there was insufficient evidence for the amount of child support awarded: she calls for

further discovery in her Question 3. This Court, however, will not review

> "concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949).

Here, the trial court granted an award of child support that it found "fair and reasonable" under the circumstances. (Resp. 2a). The Appellate Division affirmed the trial court's findings of fact, differing only "as to the manner in which certain issues should be resolved." (Pet. 7a). It further approved "the fairness" of the award, making only minor changes in petitioner's favor. (Pet. 17a-20a). These concurrent findings of fact are reasonable and do not justify review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
December 22, 1986

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney Pro Se

O. PETER SHERWOOD
Solicitor General

ROBERT J. SCHACK
HARVEY M. BERMAN
Assistant Attorneys General
of Counsel

APPENDIX

[1] FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK : COUNTY OF QUEENS
----------X

In the Matter of :

KATHY [J. (Anonymous)], : DOCKET NO. P-7212/77

Petitioner, :

-against- : DECISION AND ORDER

ARNOLD [D. (Anonymous)],:

Respondent. :

----------X

Appearances:
Ira Richard Bennett, Esq.
Attorney for Petitioner
225 Broadway
New York, New York 10007

Samuel Tannenbaum, Esq.
DiFalco, Amhurst, Smithson, Tannenbaum & Duval
Attorneys for Respondent
605 Third Avenue
New York, New York 10017

KAPLAN, J.:

A paternity trial encompasses two distinct segments, the determination of paternity, and an award of child support. Only if the Petitioner is successful in establishing paternity does the matter proceed to the imposition of an order for

the "necessary education and support of the child by each parent. F.C.A. § 513, which shall be fair and reasonable according to their respective means." F.C.A. § 545.

I. The Appropriate Standard for Child Support

The Court will make its award of child support pursuant to F.C.A. §§ 513 and 545 based on a consideration of: 1) the income and expenses of Respondent 2) the income and expenses of the child and 3) the income and expenses of the Petitioner. It will utilize F.C.A. §§ 513 and 545 as its [2] exclusive criteria.

The Court rejects Petitioner's oft recurring urgings that there can be no permissible distinction between the manner in which support is fixed for a marital and a non-marital child.

The distinction was clearly intended by the Legislature. This is

evidenced by a law passed in 1983 which amended the Domestic Relations Law § 32, and the Family Court Act § 413 by enumerating 5 relevant factors which the Court must take into consideration in fixing a child support award.

At the same time it was conspicuously silent with regard to F.C.A. §§ 513 and 545.

The Court is well aware, and is in enthusiastic agreement with recent judicial pronouncements and statutory codifications expanding and extending the rights of non-marital children.

It has been observed that an order of filiation vouches safe to a non-marital child the following rights:

> "rights of inheritance (EPTL 4-1.2, subd.a, par. 2); the right to recover benefits under the New York Worker's Compensation Law § 2, subd. 11), the Veteran's Benefits Act (US Code, tit 38, § 101, subd. 4, par. A) and the Social Security Act (US code tit 42, § 416, subd. h, par. 3, cl. A); the right to recover serviceman's life insurance

> proceeds (US Code, tit 38 § 765, subd. 9) and a military allowance (US Code, tit 37, § 401, subd. 2) and the right to notice of adoption proceedings (Domestic Relations Law § 111-a, subd. 2, par.a). A filiation order must also be filed with the Putative Father Registry which records, inter alia, the names of persons adjudicated to be fathers of children born out of wedlock (Social Services Law, § 372-c." Kordek v. Wood, 90 A.D.2d 209 (4th Dept., 1982) at 212.

[3] It is equally true that the U.S. Supreme Court has articulated a sensitivity to the rights of non-marital children in such cases as Gomez v. Perez, 409 US 535 and Mills v. Habluetzel, 456 US 91.

Petitioner relies on Maio v. Pierce, 72 A.D. 2d 943 (4th Dept., 1979) but is is inapposite in the instant situation.

Maio, supra, holds that a father cannot prefer a marital child over a non-marital child where he claims he lacks adequate resources to support both, and that he is equally obliged to support both children. It does not mean that he

is required to support each child in the same manner where the moneys allocated to the marital child in no way impair his ability to support his non-marital child irrespective of the amount awarded.

Lest there be any misapprehension of the Court's position, this Court wishes it to be entirely clear that the amount awarded for Jennifer's support was not diminished by as much as a penny because Respondent is presently supporting his 4 marital children.

While its possible that Jennifer may not be treated in the same manner as Respondent's marital children such a belief would be speculative. An ineluctable conclusion since the Court foreclosed inquiry into the standard of living of Respondent's children.

However, it is certain that Jennifer will receive a level of support that more than meets a level that is fair and

reasonable.

In Ellen N. v. Stuart K., 88 Misc.2d 280 (Fam. Ct., Onondaga Co., 1976) Judge McLaughlin in a [4] characteristically cogent opinion held that Article 5 and Article 4 of the Family Court Act prescribe different standards of support. He further found that these distinctions were based on a reasonable classification, and therefore passed constitutional muster.

This Court reviewed this very point in the context of its November 23, 1982 Memorandum Order. It stated:

> Being liable for paying an amount of support that is fair and reasonable for the support of a member of a family unit (FCA .413) cannot be equated with being "liable for the necessary support and education of the child." (FCA .513) (underscoring added).
>
> The constitutional rights of a non-marital child are not violated merely because he or she may be treated differently than a marital child. Matter of Lalli, 43 N.Y.2d 65 (1977), aff'd sub nom Lalli v. Lalli, 439 U.S. 259. Indeed children born out of wedlock are not granted suspect classi-

> fication. Matthews v. Lucas, 427 U.S. 495. Only when no rational basis exists for legislative action respecting them are constitutional considerations implicated.
>
> Judge McLaughlin's reasoning remains eminently sound notwithstanding L. 1981 ch. 300 which amended FCA .545 to provide that orders of support be made having regard to the respective ability of each parent to provide support.
>
> That amendment codified decisional law which held that a Court should consider the means of the father in making an order of support. Nardone v. Coyne, 23 A.D.2d 819 (4th Dept., 1974), aff'd 18 N.Y.2d 626."

The thrust of the Supreme Court cases dealing with equal protection of non-marital children is addressed to areas of general rights and entitlements.

[5] The Court reaffirms its adherence to that reasoning. Non-marital children are entitled to qualify for the same statutory benefits respecting the bringing of actions relating to inheritance and survivorship, and to qualify for benefits awarded to persons by virtue of their being the children of a particular father.

It is unwarranted to utilize those holdings in support of the premise that non-marital children are entitled to child support in the same dollar amount as marital children in the absence of identical statutory criteria.

Petitioner's assertion in this regard constitutes a denigration of marriage, an institution occupying a place in the forefront of our most honored social traditions.

The expanding recognition of the breadth of the dimensions of the marital estate led to the passage of the Equitable Distribution Law. There was explicit recognition of the fact that marriage constitutes an economic partnership which on dissolution requires a valuation of the contributions, economic and non-economic, of each spouse.

An award of child support in a matrimonial action entails recourse to

any number of complex factors inextricably intertwined with the marital standard of living.

This fact was made abundantly clear with the passage of L. 1983, Ch. 362 which mandated consideration of all relevant factors including five specific ones, when fixing support for marital children.

It would do violence to the recently articulated will of the Legislature to treat non-marital children in [6] exactly the same way as marital children as it would to permit non-married persons, without formal contract, to obtain equitable distribution.

II. Respondent's Net Income

During the long hiatus between the establishment of paternity and the hearing on support, Respondent's attorney voluntarily furnished the Court and Petitioner's counsel with Respondent's

tax returns and financial statements for the past several years. Since Petitioner introduced this information into evidence it will be utilized by the Court to determine Respondent's average income and net worth.

It should be noted parenthetically that this information was not deemed sufficient by Petitioner's counsel. He filed a battery of voluminous unsuccessful discovery motions.

He sought to have the Court equate a paternity proceeding with a matrimonial action and disregard the clear distinction between the two embodied in wholly separate and distinct statutory schemes. The result of this ill advised strategy and vacillation respecting deposing a person conversant with Respondent's finances served only to delay the commencement of the support proceedings.

The order of magnitude of Respon-

dent's net income is such as to avoid any reference to his gross income.

Respondent's taxable income was $691,373 in 1979 (Petitioner's Exhibit 6 in Evidence), $1,340,552 in 1980 (Petitioner's Exhibit 7 in Evidence), and $701,206 in 1981 (Petitioner's Exhibit 8 in Evidence). These figures average $911,043.66 per year.

[7] Respondent's net worth was calculated at $7,673,600 on December 31, 1980 (Petitioner's Exhibit 9 in Evidence), $8,149,295 on June 30, 1981 (Petitioner's Exhibit 10 in Evidence).

Respondent's other financial statements (Petitioner's Exhibit 11-13 in Evidence) showed a substantially reduced net worth but since they employ a markedly different format they will be disregarded.

III. Jennifer [D. (Anonymous)]'s Needs and Expenses

The inquiry next turns to the needs and expenses of Jennifer [D. (Anonymous)].

Respondent's counsel's memorandum correctly points out that Petitioner's counsel did not request that the Court award a specific amount for child support, nor did Petitioner present a detailed budget of the child's expenses.

It is understandable that Petitioner wished to avoid the dilemma of having the child's needs implicitly measured by the amounts she was able to expend given her means which are extraordinarily modest relative to those of Respondent.

It has long been the law of the state that the child's needs were not to be measured solely by the mother's means, a precept that has been applied with ever increasing vigor. Indeed the teachings of Schaschlo v. Taishoff, 2 N.Y.2d 408; and Nardone v. Coyne, 23 A.D.2d 819 (4th

Dept., 1965), aff'd 18 N.Y.2d 626 are part of the mainstream of the evolving and expanding rights of non-marital children.

The fact that the custodial parent of a non-marital child lacks the financial resources to provide [8] adequately for the child's needs does not mean that those needs do not exist. Rather it means that the custodial parent is presently incapable of meeting those needs absent significant contribution from the non-custodial parent.

While it is incumbent on Petitioner to demonstrate Jennifer's needs, it is not necessary for her to do so solely through proof of expenses actually incurred. It is enough that Petitioner prove by competent evidence that Jennifer has particular needs, and what sums are necessary to meet them.

A. Private School Education

For example, Petitioner requested that the order of support encompass the cost of private school education for Jennifer. In support of this request she introduced as (Petitioner's Exhibit 41 in Evidence) a report by Dr. Elaine Chaplin, based on standard intelligence and psychological tests administered to Jennifer under her supervision. The report noted that Jennifer's performance and verbal I.Q. scored in the superior range. She was found to be intellectually advanced, highly verbal, perceptive, possessed of a great wealth of information, highly observant and a quick learner. Her verbal scores were notably above grade level.

While Jennifer did not manifest any significant problems she experienced difficulties with perceptual organization that resulted in reading scores well below her potential. The test scores

indicated a disparity of development. Notwithstanding those cautions, the test results and testimony reveal that Jennifer is an intellectually gifted child with a superior academic [9] potential that established that Jennifer has the capacity to benefit from private school education.

The evidence respecting Respondent's finances established that he could easily afford the costs of a private school education for Jennifer, and that provision of a private school education represent the norm rather than the exception for persons enjoying his finances.

The concatenation of the child's ability and Respondent's means constitute the special circumstances which justify the conclusion that the cost of private school education is a proper element of support for Jennifer. Kotkin v. Kerner,

29 A.D.2d 367 (1st Dept., 1968); Hahn v. Hahn, 40 A.D.2d 624 (4th Dept., 1972); Ellen N. v. Stuart K., 88 Misc.2d 280 (Fam. Ct. Onondaga Co., 1976).

The exact amount that should be allocated to private school education is less readily susceptible of calculation since Jennifer is not presently enrolled in private school. This is a classic example of how Petitioner's lack of means precludes offering proof of a necessary element of support with an actual bill reflecting its costs.

In its stead, Petitioner communicated with several private schools and obtained information respecting the programs offered and their costs. These were embodied in Petitioner's Exhibit 41 in Evidence.

There has been no undertaking that Jennifer had applied to any of these schools nor guarantees that she would be

accepted at any of them. In the event that such an event occurs the order to be settled should provide for [10] including but not limited to transportation, books, meals, contributions, activities fees and charges, and uniforms.

In addition, Petitioner presented proof respecting the cost of kindergarten and first grade private school expenditures.

Jennifer was enrolled at Glendale Baptist from September 1981 through June 1982. Petitioner incurred costs of $750 for tuition, $25 for registration and $100 for uniforms, a total of $875.

Jennifer attended Our Savior Lutheran School from September 1982 through December 1982, causing Petitioner to incur tuition costs of $380.50 for registration and tuition and $200 for uniforms.

Petitioner placed Jennifer in a home

study program in January 1983, and expended $330 for teaching materials. These sums aggregate $1,835 for which she is entitled to reimbursement of 95% of $1,743.25.

B. Shelter

If there be one on-going theme in this opinion it is the tension between Petitioner's extremely limited means, and Respondent's ability to meet an award that would support a singularly lavish luxury laden life style.

Neither what Petitioner has spent or what Respondent can afford is the appropriate standard. Nor are other decisions especially instructive since all of them rest primarily on the widely divergent fact patterns brought before the court in each particular case.

Petitioner resides in a two-family house in Glendale, which is owned by her mother. Her rent is $350 a month inclu-

ding utilities. There was no indication whether [11] this sum represents fair market value, or whether it reflects a discount or premium. Petitioner stated that her home is located in a "blue collar" neighborhood in Queens, a characterization unchallenged on cross examination.

There was meager testimony offered respecting alternative living accommodations. One such was to a two-bedroom apartment in Garden City, New York, which rented for $800 a month.

It is important to note that Kathy [J. (Anonymous)] is not entitled to have her personal standard of living elevated through the guise of providing for the child. However, some instances arise where unless Jennifer were to be penalized the two would be inextricably linked.

This is particularly true with

respect to living accommodations. There can be no argument made that Respondent's child should not live in an attractive neighborhood and possess her own bedroom.

While one might argue that a one-bedroom apartment might fulfill that requirement, it could be done only if part of the living area was utilized as Petitioner's sleeping quarters, an unwarrantably harsh diminution of the quality of Jennifer's life style.

After consideration of the credible evidence, I find it proper to allocate $450 a month or $104 per week for Jennifer's shelter and utilities needs.

C. Food

Respondent's counsel commented on the lack of receipted bills or breakdowns relating to the cost of food for Jennifer. While other areas of inquiry provide notable opportunity to inflate and exaggerate costs, the Court is [12]

well able to assess the reasonableness of the claim for Jennifer's food costs even absent corroborating documentation. Ellen J. v. Stuart K., supra. Petitioner claimed that she spent $100 per week for herself and Jennifer for food consumed in their home, and allocated one half of this cost to Jennifer. The Court credits this testimony, and finds that Jennifer's food costs total $50 per week.

D. Entertainment & Travel

In contrast to food costs, the area of entertainment expenses provides fertile grounds for exaggeration and extravagant expenditures. The situation is not ameliorated by Petitioner's decided inability to furnish financial particulars that are accurate or precise.

Petitioner's entertainment expenditures for Jennifer fall into the categories of recreation, parties, dining

out, and vacation trips.

Petitioner did not give a specific figure for recreation but the various activities such as movies, broadway shows, roller skating, and amusement parks warrant a finding of a weekly expenditure of $10.

Petitioner testified that she spent approximately $450 a year on parties for Jennifer, an average of $8 per week.

She further testified that it was her custom to dine out with Jennifer and that she spent approximately $100 a month for the two of them. I apportion one-half of this expenditure to Jennifer, which translates into a weekly expense of $12.

Petitioner mentioned several trips to the Amish [13] Country which she took with Jennifer sometimes accompanied by other family members. There were also trips to Oakland, New Jersey and Schroon

Lake, New York, and Montreal.

These trips were taken in an automobile successively registered to Diane and Ruth [J. (Anonymous)]. No mention was made of the costs involved.

There were 3 occasions on which Petitioner took Jennifer to California. Petitioner gave no testimony regarding the cost of the trips, or how it was apportioned.

Petitioner's maiden aunt, Dorothy [K. (Anonymous)], was apparently the source of Petitioner's funds for these trips.

She testified that on one occasion she lent Petitioner $1,500 for herself, and $1,500 for Jennifer for the first California trip which the three of them took. She also supplied $2,000 for their combined expenses.

While Mrs. [K. (Anonymous)] testified that these moneys, as well as

multitudinous sums given by her to Petitioner were loans, the Court is disinclined to view them as anything but gifts from a childless aunt to a favorite niece and grand niece.

There are no records of these transactions let alone ones that would substantiate indebtedness.

The contrary is very much the case. Mrs. [K. (Anonymous)] testified that on the one occasion when Petitioner gave her an IOU evidencing an indebtedness of $3,000 she tore it up.

While the Court is not inclined to view the moneys paid over by Mrs. [K. (Anonymous)] to Petitioner in toto as a regular source of funds, it will consider these payments in computing Petitioner's income. Blickstein v. Blickstein, 472 NYS 2d 110 (App. Div. 2nd Dept., 1984). It is [14] appropriate however, that some allowance for travel be included in the

order of support, and the Court awards $25 a week for this item.

E. Clothing

Petitioner stated that she spent approximately $500 per season for Jennifer's clothing, but slightly more in the winter. In addition she spent $250 for uniforms. Accordingly, Jennifer's clothing needs are fixed at $2,500 or $48 per week.

F. Obstetrical and Medical

Petitioner stated that she borrowed approximately $500 to pay the fees of her obstetrician.

Petitioner's Exhibit 33 in Evidence encompasses some of the medical, laboratory and pharmaceutical expenses incurred by Petitioner on behalf of Jennifer. They total $296.25.

Respondent is directed to pay the lump sum of $796.25 to reimburse Peti-

tioner for these outlays.

Exhibit 8 in Evidence, Respondent's 1981 tax return indicates that he deducted $150, the statutory maximum for medical insurance premiums.

Since he carries medical insurance for himself and his family, he is directed to include Jennifer under his plan for medical, dental and prescription coverage. In the alternative he may elect to cover her under a separate policy so long as it provides the same benefits. In addition he shall be responsible for 95% of any amount deductible.

IV. Petitioner's Income & Expenses

Since the Family Court Act makes each parent [15] equally responsible for the support of their child(ren) in a manner proportionate to their respective means, it is necessary to determine Petitioner's income and expenses.

Petitioner obtained her G.E.D. during the 1½ year period in which she attended Queens College. Her employment experience is minimal, and no more recent than 1975.

While she is well spoken, poised and reasonably intelligent, any reference to earnings would necessarily be based on potential.

However, during the last seven years she has received an average of $5,200 annually in Court Ordered child support.

In addition, she testified that she received large sums of money from various members of her family which she claims were loans.

While it is obvious that Petitioner's aunt, Dorothy [K. (Anonymous)] regularly furnished her with sums of money which may well have aggregated $20,000, the Court has previously articulated its belief that these payments were

actually gifts from an aunt to a favorite niece and grand niece, the natural repositories of her interest and bounty.

I simply cannot believe that petitioner's sister, Diane [J. (Anonymous)], loaned her $5,000. Diane [J. (Anonymous)]'s testimony was vague, selectively informative, and thoroughly discredited on cross examination.

She was convincingly impeached respecting the purchase of a new 1981 Datsun. She was less than candid when she could not remember whether she had paid for the car with cash, or used either a commercial bank or savings bank check even though she was unable to recount when she was [16] last employed, or was discharged from military service.

Her purported lack of remembrance is not surprising. At a point close in time to the purchase of the car, Dorothy [K. (Anonymous)] had withdrawn $7,000 from

one of her own Federal Savings and Loan Association accounts, and the same day had the bank issue a check to Nemet Motors, the dealer from whom Diane [J. (Anonymous)] acquired the Datsun.

This was not the first time that Dorothy [K. (Anonymous)]'s moneys had been used to purchase a care for one of her [J. (Anonymous)] nieces.

Considerable time was devoted to the circumstances surrounding the purchase of a 1980 Oldsmobile which Petitioner claimed she used to take Jennifer to her school. It was also used for Jennifer's health, cultural, and recreational activities as well as vacation trips.

Petitioner claimed that she borrowed the money to pay for the car from Dorothy [K. (Anonymous)], but had it registered first in her sister's name, and then in her mother's name. She did so to conceal this valuable asset from the Department

of Social Services.

This flagrant act of duplicity offends the conscience of the Court. Petitioner is not allowed any recompense for the car's purchase or maintenance. Since Petitioner, her aunt, and sister were all aware of this deceitful machination, they all suffer a diminution of credibility.

The Court is sympathetic to the fact that the recent death of Petitioner's brother had rendered Petitioner's mother so grief stricken that she was in no condition to give testimony. Nonetheless Petitioner had [17] testified that all her family's money was kept in accounts that always had 2 or more relatives as signatories. She had shown a comprehensive and detailed knowledge of which of the numerous accounts belonged in actuality to which relative. And yet in contrast to the detailed tracing of

payments from Dorothy [K. (Anonymous)] to Petitioner no proof was forthcoming, let alone admitted into evidence, suggesting that Ruth [J. (Anonymous)] made any loans to Petitioner.

Respondent misperceives the significance of the effect of the loans on two counts. He believes that evidence of the loans was introduced "to enhance in the mind of the Court the amount of money needed for necessary support and education." He also argues that Respondent is not responsible for the loans made to Petitioner. His position is correct with respect to the second ground, but gratuitous. Petitioner made no claim for reimbursement, no would the Court have allowed it.

With respect to the first point, while money actually spent is probative of the amount appropriate for necessary support and education, it is not the sole

determinant as Respondent readily acknowledges. It is therefore regrettable that Petitioner resorted to these fabrications since they were unnecessary.

The Court's assessment of Petitioner's credibility strongly impacted its decision respecting a number of items considered in determining the appropriate level of support. Credibility is a compendium of many elements, most prominently those of veracity and accuracy.

The Court's confidence in Petitioner's veracity was seriously undermined by her machinations with respect to [18] the ownership of the Oldsmobile, her responses to the Department of Social Services respecting her assets, and her testimony respecting funds allegedly advanced by her mother and sister.

The Court's lack of confidence in the accuracy of Petitioner's statements was occasioned by Petitioner's vague and

imprecise recollection of mundane financial details, and her apparent lack of recollection with respect to reoccurring conversations with officials of the Department of Social Services. They were in glaring contrast to her demonstrated ability to detail the labyrinthine financial details of her family's savings accounts.

Petitioner has shown herself to be vague and imprecise about moneys throughout the course of the proceeding. She consistently confused sources of funds, as well as their application. She seemingly blurred the distinction between sums to be used for her daughter's benefit and those for herself. This was most evidence respecting trips taken to California.

Petitioner's confusion over her finances was strongly demonstrated by her statements about the proceeds of the June

19, 1980 check for retroactive child support in the amount of $5,400.

Petitioner maintained in the course of 8 affidavits that she lacked any funds to pay her attorney a counsel fee, a position reflected in Petitioner's attorney affidavits. Some of these affidavits however spoke in terms that clearly stated that no moneys were paid over when in undisputed fact Petitioner's attorney retained some $3,000 for disbursements.

[19] While blame for these inexact and therefore misleading statements must be ascribed to Petitioner's attorney who drafted petitioner's affidavits, it also diminishes the Court's perception of Petitioner's capacity for accurate characterization of facts.

The Court after weighing the testimony and evaluating the credibility of Petitioner and her witnesses concludes

that Petitioner has the potential to earn $250 per week, and that her legitimate expenses total $150 per week.

V. The Award of Support

The language of F.C.A. § 545 directs the Court "to fix a fair and reasonable sum according to their (the parent's) respective means as the Court may apportion."

I do not read this language to require me to make an award based on a precise mathematical formula. If such were the case, Petitioner's weekly contribution would likely be calculated in cents rather than dollars.

Instead the Court will make Petitioner responsible for 5% of Jennifer's expenses.

These expenses comprise on a weekly basis: Parties: $8; shelter: $104; food: $50, clothing: $48; entertainment: $10; dining out: $12; travel: $25. They

aggregate $257 per week of which sum Respondent shall pay $244.15. In addition he shall furnish comprehensive health coverage and be responsible for private school education as provided, supra.

In accordance with Respondent's request it shall be payable to the Support Collection Unit which shall pay it over to Petitioner. F.C.A. § 546.

The temporary order of support of $100 is of course, less than the $236.55 awarded as child support. [20] This necessarily results in the creation of arrears of $136.55 per week. However one cannot determine the arrears accrued by merely taking the number of weeks the temporary order has been in effect, and multiplying that figure by $136.55. Carmen V. v. Bruce R., 80 A.D.2d 560 (2nd Dept., 1981).

Instead the arrears will be retroac-

tive to June 13, 1982. The proof elicited at the hearing which commenced on June 13, 1983 was only for expenses for the year proceeding that date. This period comprises 103 weeks which when multiplied by the weekly arrears of $136.55 totals $14,064.65.

In addition, proof was presented for expenditures previously paid as well as during the year prior to the commencement of the hearing. They were the subject of lump sum awards of $796.25 for obstetrical and medical expenses, and $1,743.25 for educational expenses.

The aggregate of these sums is $16,604.15. This amount shall be paid to the Support Collection Unit no later than eight days after service upon Respondent's attorney of a copy of the order to be settled herein.

Petitioner's counsel has oft reiterated his intention to apply to the Court

for counsel fee.

It was agreed that this aspect of the proceeding would abide the final award of child support.

Accordingly, Respondent's counsel is directed to an affidavit of services as well as an itemized account of disbursements for which recovery is sought. There shall [21] also be filed an affidavit of services by any other attorney who will receive any moneys from the sum awarded for counsel fees. These affidavits shall be submitted by July 5, 1984.

Unless counsel stipulate otherwise a hearing on the application for counsel fees shall be held on July 23, 1984. Sadofsky v. Sadofsky, 78 A.D.2d (2nd Dept., 1980); Olsan v. Olsan, NYLJ April 11, 1984, p. 6, col 3 (1st Dept., App. Div. 1984).

Notify attorneys.

ENTER:

BRUCE M. KAPLAN

Judge of the Family Court

Dated: New York, New York

June 7, 1984